Autoridade da Concorrência

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Opening Keynote

Technology and Competition

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Check against delivery

Good morning, ladies and gentlemen.

On behalf of the AdC, allow me first to thank the President of the ItechLaw Association together with chairs and co-chairs of this European Conference for the kind invitation to open the debate. I am delighted to be here.

Introduction

Our lives are being disrupted by change and innovation. The pandemic has resulted in major economic shocks and upheaval, with an unprecedented speed, severity, world-wide dimension, and in turn, it accelerated the digital transformation.

Though countless advances in the history of civilization have been prompted by crisis and disruptions, there is a distinctive trait in innovation nowadays, which is its astonishing pace. This is enabled by the unprecedented availability and flow of information, data and knowledge throughout the planet. We are a knowledge-based society powered by technology, data and digital.

And to a large extent competition policy is at the heart of this cultural transformation and the many challenges it brings to our societies. So I am really

glad that the Itechlaw Association decided to open this conference through the lens of the AdC, through the standpoint of a competition enforcer

Because competition policy plays a key role in ensuring a successful and fair digital transition, in ensuring that people and businesses, either big or small, are able to fully seize the benefits of this new world.

I will tell you how.

But first, a word of context

Like everything else in life, before deciding where one should go, I find it in important to take a step back and remind ourselves how we got where we are today.

For a long time, when it comes to the assessment of unilateral conduct (that is, abuse of dominance or monopolization, depending on the side of the Atlantic where you stand) there has been a transatlantic divide and convergence proved to be difficult.

In the US, antitrust has been traditionally regarded as a "consumer welfare prescription", meaning that antitrust intervention was only warranted when palpable, short-term consumer harm could be shown in the form of higher prices or reduced output. And in the digital economy this is hard to establish, since web services are often provided supposedly for free, whereas in Europe we were usually concerned with protecting the competitive process and the existence of competitive market structures.

There is also an underlying ideological foundation to the US approach, notably Schumpeter's theory of social-economic evolution consisting of a never ending process of creative destruction, led by technological change and grounded on the belief that monopolistic structures may actually foster innovation, under the assumption that any moment a new technology could disrupt the status quo.

However, this approach has also led to a laisser-faire competition enforcement and arguably facilitated high concentration levels in many industries in the US,

together with wealth and income inequality and, more importantly, to the creation of tech giants that only keep on growing because of network effects.

Their positions have sometimes become entrenched and the fact remains that we have not seen any replacements or "creative destructions" in the marketplace for a long time.

Even the *Economist* magazine has called for the need to regulate the net and tame the titans for they are deemed to be *BAAD*, an acronymic for too "Big, Anticompetitive, Addictive and Destructive to Democracy".

Hence, it seems that even in the US, there is a sense that people might not be in full control of their economic destiny, so that freedom of opportunity and the entrepreneurial spirit might be under threat, a scenario that is reminiscent of the foundations of antitrust when the Sherman Act was born as a popular response to the increased concentration of power in the hands of the trusts which was perceived as endangering the pillars of democracy and the individual freedoms.

The critics of this new approach have labelled it populist or hipster antitrust. But regardless of labels, the Times they are a-Changin… (to quote from an American Nobel laureate).

In July this year, president Biden issued an executive order on Promoting Competition in the American Economy, in a commitment to reinvigorate antitrust enforcement, whose ambition is to lower prices for families, increase wages for workers, and promote innovation and faster economic growth. In a bold gutsy move, he appointed 32-year old academic Lina Khan as chair of the FTC, who had wrote an influential article entitled "Amazon's Antitrust Paradox" calling for the need to break-up this tech giant. The FTC sued Facebook to unwind its acquisitions of Instagram and WhatsApp. Many bills were introduced both in Congress and at the States level, whose common thread is about preventing data concentration and anti-competitive practices by Big tech and whose provisions resemble, to a large extent, notions of EU competition law, such as abuse of dominance or even the provisions of the Digital Markets Act.

Policy statements from both sides of the ocean appear to agree on the idea that competition law can take into account both privacy and data access concerns.

In my opinion, the digital economy is thus bridging the transatlantic gap. It is facilitating global antitrust convergence, something that would seem unlikely just a few years ago, which I suppose is good news for companies acting globally, and their advisors, as firms expect regulation to be, if not uniform, at least coherent across jurisdictions.

The Digital Markets Act (DMA)

This brings me to this side of the Atlantic and to the so-called Digital Markets Act (DMA).

The AdC co-chaired the negotiations of the DMA between Member States in the 1st semester of this year, throughout the Portuguese Presidency. The legislative process will likely be concluded during the French presidency in the 1st semester of 2022, so do stay tuned.

This initiative draws on the experience of competition law enforcement in Europe and it is the result of a reflection process on the impact of digitalization on our economies and societies. Though not yet in force, it provides a clear insight into how the future of Big tech regulation will look like.

Its goal is to prevent so-called "gatekeepers"[1] from imposing unfair conditions on businesses and end users. While the exact criteria for designation as a "gatekeeper" is still under negotiation, one could certainly expect that the usual suspects will be under the scrutiny of the DMA.

[1] *Gatekeepers are companies that provide at least one core platform services (such as social networking): (i) Have a size that significantly impacts the internal market; (ii) Serve as an important gateway for business users to reach end users; and (iii) enjoy, or will foreseeably enjoy, an entrenched and durable position.*

Once a company that provides at least one "core platform service"[2] is designated as a "gatekeeper", it will have to comply with a series of *dos and don'ts* in its daily operations in areas such as interoperability, access to data, side loading, equal treatment of vendors and data portability.

By setting *ex-ante* rules to keep large platforms in check, if approved, the DMA is likely to provide a key contribution to a more contestable and open digital landscape, where all businesses can thrive.

DMA and Competition Law complementarity

The DMA will work as a complementary tool to the case-by-case enforcement work of competition agencies. It will not replace competition enforcement, which will continue, and may even intensify.

Let's not forget that the European Commission and the competition agencies of EU Member States, such as the AdC, work together within the European Competition Network (ECN). This is a decentralized but articulated system of enforcement, whereby we hold equal powers to enforce competition law in full across the EU.

As to the design of this enforcement system

While the DMA will be enforced by the Commission, Member States will have the power to request the opening of market investigations for the purpose of designating new gatekeepers.

The AdC together with other national competition agencies will likely have an active role in the enforcement system as well, not only because of their expertise in seizing evidence and finding anticompetitive behavior, but also for effectiveness reasons.

[2] *To be designated as a "gatekeeper", these large companies must control at least one so-called "core platform service". According to the proposal, these "core platform services" can include: Online intermediation services (booking); Online search engines (google); Social networking services (Facebook, Instagram); Video sharing platform services; Operating systems (microsoft) Cloud services; Advertising services, etc*

The Commission, while enforcing the DMA, and national agencies authorities, while enforcing EU and national competition rules, will need to coordinate and cooperate even closer to avoid, for example, conflicting remedies on gatekeepers.

Therefore, national agencies active involvement is required to avoid any potential bottlenecks, and ensure a coherent implementation of the DMA, EU and national competition rules.

The importance of getting it right

We are acutely aware of the fact that well intended Regulation may cause unintended distortive effects and chill the very same competition and innovation that it was supposed to spur.

Just last week, at the Web Summit here in Lisbon, Apple's VP argued that if Apple would be required to allow side loading outside the Appstore, such as the DMA currently requires, something like an apocalypse would ensue, leaving the system and users completely exposed to security breaches, to being ripped-off. He may have a point. But other platforms contended that Apple is not the only company in the world capable of designing a secure system, that Apple's approach when it comes to the *iphone* and *ipad* is incompatible with its approach on the *Mac*, and more importantly, that consumers pay higher prices because Apple charges 30% of all revenue generated through the *AppStore*.

In any event, regardless of whose right or wrong in this debate, it is key that DMA is fairly balanced and fine-tuned not to stifle innovation and competition but to actually promote it.

But I am optimistic. Indeed, sometimes regulation follows innovation, such as in the case of AI, cryptocurrencies and blockchain – where public decision makers are still in the process of fully assessing what these technologies are capable of; their potential to enhance or harm our societies.

But other times, it is the other way around; regulation actually paves the way for more innovation and competition. Initiatives like open banking or the so-called PSD2 Directive have taught us this, as many new fintech providers entered the

market as a result the data sharing obligations imposed on banks. Of course this trend is being accelerate by the burst in e-commerce; which has significantly expanded the market and created new business opportunities for payment service providers.

The AdC's experience and policy approach

Now that I have given you a flavour about what is happening in terms of policy reforms across the globe, allow me to also address the AdC's experience and policy approach in recent years.

We have been resorting to the full spectrum of our competition law toolbox to address the challenges brought by new tech.

Let me start with merger control

As you may know, there has been a debate in Europe on the need to revise merger control thresholds in order to allow agencies to capture so-called killer acquisitions. Because digital markets are prone to winner-takes-all outcomes, there is a concern that market power here is being kept not necessarily through "superior skill, foresight and industry" but by systematically taking over rivals' innovations, before they meaningfully reach the market.

Market power today is often based on access to big data, including valuable information on consumers' preferences and personal habits. The common insight is that data and not oil is currently the planet's most valuable resource, the currency that people give away to gain access to certain web services. Access to data has played a major role in a number of recent merger cases, such as Microsoft/LinkedIn or Google/FitBit.

In the digital economy, a company's database may actually be more valuable and attractive than its turnover. But the turnover of, for example, some data driven start-ups may not be high enough to be caught by merger notification thresholds as their business model may not yet be monetized.

Some countries, like Germany or Austria, changed their merger thresholds to fix this concern. In Portugal we have been able to deal with this question without the need to fix our merger thresholds, because for a long time they have combined both turnover and market shares. A merger is notifiable to the AdC not only when the parties generate a certain amount of turnover but also if it leads, for ex. to the creation or reinforcement of a market share in excess of 50%. Our regime proved to be quite handy in solving questions brought about by new tech, allowing us to review, for example pure digital transactions between online platforms, that otherwise might have flown under the radar and where data concentration was a concern.

Therefore, if a merger is not notifiable to the Commission because it does not meet the turnover threshold it may well be notifiable to the AdC on account of the market shares of the parties. And we may if necessary refer it to the Commission for assessment.

Additionally, we have **been proactively detecting and investigating potential gun jumping behavior**, that is, the implementation of mergers, including digital mergers, prior their notification or approval by the AdC.

The digital landscape is also creating a merger trend towards **convergence and vertical integration** in many industries, for example media and telecommunications, the enablers of the digital economy.

Digital has encouraged disintermediation. Specific content is often no longer provided through paid TV or free to air channels or by actually purchasing a music album or music track, but directly to final consumers. Streaming has become the main way how music reaches the masses; it transformed the ways how consumers access, listen or watch audio visual content. So media executives have understood that they need to scale up both in terms of distribution and content. In turn, telecom operators are dreading the risk of becoming mere commodities. More than to merely own the pipes through which media content travels, they realized that they need to control content as well, in order to be able to influence consumers' preferences.

A few years ago, the merger between *AT&T and Time Warner* in the US and the attempt of Altice, Portugal's telecom incumbent, to buy Media Capital, our leading broadcaster at the time in Portugal are good illustrations of this trend. The US deal was unsuccessfully challenged by the FTC in courts, our counterparts in the US, whereas the merger between Altice and Media Capital did not follow through. We opened an in-depth investigation into the deal, because it would foreclose the market, raise rivals' costs and increase prices to consumers. The parties ultimately dropped the transaction.

We also have several pending **antitrust investigations** concerning digital and telecommunications but as they have not yet reached a final decision I will refrain from discussing those cases further today.

Given the explosion in e-commerce our **enforcement and advocacy priorities** in recent years have turned to digital.

We created a cross-departmental **digital task force,** which builds internal expertise, tracks developments in digital markets and most importantly targets and investigates anticompetitive behavior therein.

Just last week, during the web summit, we launched a **call for information** to all stakeholders, businesses, start-ups, the general public to assist us in identifying possible barriers to entry and expansion, exclusion strategies by incumbents or dominant firms, as well as the concerns raised by the use of algorithms, namely to monitor and set prices.

I take the opportunity to invite you all, together with the firms that you represent to contribute. This initiative is a follow-up of our **Issues Paper on Digital ecosystems, Big Data and algorithms** released in 2019 where the question was whether we should fear algorithms? It seems that they can predict almost every aspect of daily life and with the help of AI they are increasingly self-learning. We gathered insights from online firms active in Portugal in order to better understand to what extent this technology is being used.

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Of course there has been an intense debate on how pricing algorithms may facilitate collusion, so I will not get into detail there except to say that the report draws attention to the fact that certain forms of algorithmic-led collusion are unlawful – for ex. when rivals subcontract the same pricing algorithm to a common supplier.

There are risks of explicit collusion between competitors, with or without the help of a third-party, to jointly use the same pricing algorithm, thereby reducing the need for regular communication[3]. There are even risks that competitors can decode the rules and data used by its competitors pricing algorithm through repeated market interactions, which allow the emergence of tacit collusion.

When it comes unilateral conduct, the report shows that firms use algorithms to make online rankings and recommendations, mostly in digital advertising and search engines and that according to current statistics 75% of platform users in Portugal (the highest value for the whole EU) consider the order in which search results are displayed affects their consumption behaviour. This allows firms to exploit behavioural biases, to divert consumers from certain products or services to others, raising the risk that dominant firms leverage their market power to neighbouring markets.

In short, either by facilitating collusion or by abusively leveraging market power into neighbouring markets, our report warns firms that they are responsible for the technology they use, be it algorithms or AI, and that they cannot escape liability by hiding behind the argument that "the computer did it".

One final remark to say that it is not only firms that can harm competition. Governments can do that quite effectively as well, even if involuntarily. Our

[3] Recent investigations in the UK and the USA concerning online sales of poster show how pricing algorithms can be instrumental for the emergence and stability of collusion between competitors. In these cases, some poster sellers in the Amazon marketplace agreed to use the same pricing algorithm, thus facilitating coordination between them.

mission is not complete if one does not take into account the competition impact of public restraints.

We have been issuing several **reports[4] and recommendations to the government and sector regulators in areas that benefit the most from digital innovation, like the financial sector.**

We have been insisting on the point that national financial regulation should neither become a disproportionate barrier to entry nor be used by incumbent banks to strategically foreclose the market or stall market developments[5], for example, by refusing access to key inputs such as account data to new service providers.

When addressing the challenges posed by fintech, often the tension between competition and stability in the financial sector arises. However, the benefits of competition as a catalyst of productivity and growth in the financial sector must not be overlooked, even if prudential oversight is also required.

In a study published in March 2021, which is a follow-on from a previous one of 2018, we concluded that obstacles still remain in accessing account data and banking infrastructure by new payment service providers. The position of incumbent players, together with the existence of a closed ecosystem are perceived by most stakeholders as an entry barrier (74% of firms providing services in Portugal, perceive the existence of barriers to entry in the market. 64% refer to the position of incumbent operators and the existence of a closed ecosystem as existing barriers to entry).

There have been encouraging market developments, with innovation being led both by new entrants and traditional players, but there is still work to be done.

[4] Issues Paper on Technological Innovation and Competition in the Financial Sector in Portugal (2018): http://www.concorrencia.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Banca_e_Seguros/Pages/Executive-Summary-Issues-Paper.aspx?lst=1

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Of course the plot thickens, with BigTechs also entering financial markets who may combine financial information banks are required to share with their own data on users' habits and personal lives, together with their cutting edge knowledge of digital technology and AI, so as to provide new financial services, which of course can be welfare enhancing, but also raise a number of systemic concerns.

The regulatory reforms that are underway, the DMA, AI and data governance data regulations address some of these concerns, by levelling the playing field and rendering digital markets safer, as well as more open and contestable.

In conclusion

We may all agree on the point that size in itself is not a bad thing. Scale can bring efficiencies. And success is certainly not prohibited. Digital and the knowledge-based society created products and services that have made the world a better place, which is important to preserve.

There is also another silver-lining so far of this Big Tech saga, which is the fact that other industries, such as banking, pharma, healthcare, telecoms, media, etc. are getting uneasy on account of Big tech, forcing them to get out of their comfort zones. And I confess: I tend to like it when I see companies getting nervous and channelling that nervousness to become more innovative and competitive to the benefit of us all.

That being said, Big tech firms, or any other firm for that matter, do not produce innovation and foster consumer welfare out of the kindness of their hearts. They need to have incentives to do so.

Indeed, the underlying policy approach in Europe has always been about the need to preserve incentives for companies to do the right thing – compete - so that new businesses, ideas and creations can flourish, so that people remain in control of their data, of their choices and of their lives.

The AdC's enforcement record together with that of the ECN is a testament to this approach. The policy initiatives such as the Digital Markets and Services Acts, the

data and AI Regulations may also play a key role in ensuring that consumers and companies are able to fully seize the benefits of the digital economy.

This is a very basic old insight that goes back to Adam Smith really, but which also holds true in the digital landscape: it is rivalry, coupled with vigorous competition enforcement, that provides the right incentives for innovation, whereas with scarce or no competition, society will most likely suffer. And, at least in Europe, we must not, we will not, allow this to happen.

Thank you for your attention and for having us.

Enjoy the rest of the conference.

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